Supreme Court, U.S.
FILED
AUG 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, and MICHAEL K. MCCABE,

Petitioners,

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a judgment of a district court must be vacated, pursuant to Fed. R. Civ. P. 60(b)(4), where it is undisputed that the district court did not have subject-matter jurisdiction *ab initio* but there was an "arguable basis" on which subject-matter jurisdiction could have rested.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, and MICHAEL K. MCCABE,

Petitioners,

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The order of the Court of Appeals denying the Petition for Rehearing with Suggestion for Rehearing *En Banc* is not reported and is reproduced in Appendix A. The order of the Court of Appeals affirming the District Court's opinion is not reported and is reproduced in Appendix B. The unreported opinion of the District Court is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1988; a timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on May 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Fed. R. Civ. P. 60. **Relief from Judgment or Order.** . . . (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void. . . .

STATEMENT OF THE CASE

Parties

The Minnesota State Ethical Practices Board (MEPB) is a state agency created pursuant to the Minnesota Ethics in Government Act, *Minn. Stat.* 10A.01 *et seq.* and assigned the responsibility of enforcing that Act. The National Rifle Association (NRA) is an incorporated, not-for-profit membership organization of approximately 2.8 million members. The National Rifle Association Institute for Legislative Action (NRA-ILA) is an operating division of the NRA, primarily concerned with the legislative and political activities of the Association. The National Rifle Association Political Victory Fund (NRA-PVF) is the separate, segregated fund of the NRA, as that term is defined by the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.*

Neal Knox was the Executive Director of NRA-ILA and Chairman of the NRA-PVF from January 12, 1978 to April 15, 1982. Warren Cassidy was the Executive Director of NRA-ILA and Chairman of the NRA-PVF from April 15, 1982 until May, 1986. William B. Binswanger is the treasurer of NRA. Michael K. McCabe was the treasurer of the NRA-PVF from April 15, 1982 until July 30, 1985.

Facts

While the procedural history of this case is somewhat complex, the material facts can be summarized as follows.

After Respondent filed suit in the appropriate state court in 1982 against Petitioners alleging violations of the Minnesota Ethics in Government Act, Petitioners' former counsel removed the case to the U.S. District Court for the District of Minnesota on the ground that there were federal constitutional and statutory *defenses* to the allegations in the Respondent's complaint.[1] Without expressly considering or ruling on the question of subject-matter jurisdiction—apparently because Respondent, which had initially filed a motion to remand to the state court, withdrew its motion to remand—the District Court ruled in favor of Respondents on the merits of the case and, *inter alia*, entered a permanent injunction against Petitioners.

On appeal of the District Court's judgment to the U.S. Court of Appeals for the Eighth Circuit—which the Court of Appeals affirmed, 761 F.2d 509 (8th Cir. 1985)—neither Petitioners' former counsel nor Respondent's counsel raised the issue of subject-matter jurisdiction. In subsequently petitioning this Court for a Writ of Certiorari, however, Petitioners' present counsel raised the issue of subject-matter jurisdiction. Notably, Respondent's opposition to the Petition did *not* assert that the District Court in fact had subject-matter jurisdiction. The Petition was denied by this Court. 106 S.Ct. 853 (1986).

Following denial of the Petition for a Writ of Certiorari, Petitioners sought to have the Court of Appeals,

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[1] Under this Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841 (1983), the district court plainly did not have subject-matter jurisdiction pursuant to 28 U.S.C. 1441.

through the vehicle of a Motion to Recall the Mandate, consider the issue of subject-matter jurisdiction for the first time. Again, as in this Court, Respondent did not assert—as it never has at any stage of this litigation—that the District Court in fact had subject-matter jurisdiction; Respondent contended only that a Motion to Recall Mandate was procedurally inappropriate. After the Court of Appeals, without opinion, denied Petitioners' Motion to Recall Mandate, Petitioners filed, in the District Court, a motion to vacate the judgment of the District Court, pursuant to Fed. R. Civ. P. 60(b)(4), since there remained, and still remains, an outstanding permanent injunction against Petitioners. After that motion was denied by the District Court (See Appendix C), Petitioners appealed to the Court of Appeals which, on February 8, 1988, affirmed, without opinion, the District Court's denial of Petitioners' Motion to Vacate. See Appendix B. A subsequent Petition for Rehearing with Suggestion For Rehearing *En Banc* was also denied, without opinion, on May 20, 1988. See Appendix A.

REASON FOR GRANTING THE PETITION

In affirming the District Court's opinion that it need not vacate a judgment pursuant to Fed. R. Civ. P. 60(b)(4) since there was an "arguable basis" on which subject-matter jurisdiction *could* have rested even though it was undisputed that the district court did not have subject matter jurisdiction *ab initio*, the Court of Appeals' decision is in conflict with applicable decisions of this Court and of other courts of appeals.

While the evolution of this case is long and complex, it now stands before this Court on a single issue going to the very power of federal courts to adjudicate "cases or controversies." As will be shown below, in affirming the District Court's opinion denying Petitioners' Rule 60(b)(4) motion, the Eighth Circuit joins the Second Circuit in being squarely at odds with the decisions of this Court and of five other circuits on the narrow but significant

issue of whether a judgment resulting from a district court's erroneous assumption of subject matter jurisdiction must, in all cases, be vacated. To resolve that conflict and prevent the further adoption of the unjustified principle established by the Eighth and Second Circuits, this Court should grant this petition.

A) The heart of the opinion of the District Court in the instant case (as affirmed by the Court of Appeals) is its conclusion that, while subject-matter jurisdiction was absent, its prior judgment need not be vacated since there was "an arguable basis for a finding of [subject-matter] jurisdiction" Appendix C, at 7a. The standard adopted by the District Court in denying Petitioners' Rule 60(b)(4) motion was derived primarily from the District Court's reading of the Second Circuit's decision in *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986) in conjunction with *Kansas City Southern Railway Company v. Great Lakes Carbon Corporation*, 624 F.2d 822 (8th Cir. 1980) (*en banc*). Thus, notwithstanding the fact that the District Court indisputably lacked subject-matter jurisdiction, the Eighth Circuit, in affirming the District Court's opinion, has essentially concluded that a federal district court *may* decide a case when it lacks subject-matter jurisdiction as long as there was at least "an arguable basis" on which the district court could have rested jurisdiction. As *Nemaizer* was the key element in the District Court's reasoning, an analysis of it is in order.

In *Nemaizer*, the Second Circuit was reviewing a district court order which amended, pursuant to Rule 60(b), its previous order dismissing a prior action with prejudice. At the outset, the Second Circuit stated that it would

> assume without deciding that appellees correctly claim that this case was improperly removed and

> the district court improperly exercised its jurisdiction . . . . 793 F.2d at 64.

Notwithstanding its recognition of the fact that subject matter jurisdiction was absent, the divided Second Circuit panel, relying on *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), which in turn relied on *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968), held that

> the district court could *reasonably* have found that ERISA's remedial provision, 29 U.S.C. § 1132(a), so completely preempted N.Y. Labor Law § 198-c that an action brought under § 198-c "arose under" ERISA. (emphasis added). 793 F.2d at 65.

The court based its holding on its conclusion that success on Rule 60(b)(4) motion required that there be both "a 'total want of jurisdiction' *and* no arguable basis on which [the district court] could have rested a finding that it had jurisdiction." 793 F.2d at 65. Thus, in the Second Circuit's view, even if there was a "total want of jurisdiction," a district court's judgment would be beyond attack if there were an "arguable basis"—whatever "arguable" means—on which the district court could have grounded its eroneous finding of jurisdiction. Indeed, in concluding that the district court's judgment was not void, the Second Circuit made clear that its decision was based *not* on whether the district court's finding "was correct, *only* that it was reasonable . . . ." 793 F.2d at 65. In short, the Second Circuit determined that the key to questions of subject-matter jurisdiction is not whether subject-matter jurisdiction in fact existed but only whether district court's exercise of jurisdiction was "reasonable." Based on *Nemaizer*, the District Court in the instant case concluded that its prior implicit finding [2]

[2] The District Court did not actually consider or rule on subject-matter jurisdiction as Respondent withdrew its motion to remand to the state court.

of subject matter jurisdiction was similarly "reasonable" since it was "arguable" that "the Minnesota Ethics and Government Act was preempted by the Federal Election Campaign Act of 1971. . . ." Appendix C, at 7a.[3]

B) In conflict with *Nemaizer*—as well as with the Eighth Circuit in the instant case—this Court, in *Insurance Corporation of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 102 S.Ct. 2099 (1982), unanimously and unqualifiedly wrote that

> Federal courts are courts of limited jurisdiction . . . . Jurisdiction of the lower federal courts is . . . limited to those subjects encompassed within a statutory grant of jurisdiction. . . . Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, (citation omitted), principles of estoppel do not apply, (citation omitted), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." (citation omitted). (emphasis added) 456 U.S. at 701-2, 102 S.Ct. at 2103-4.

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[3] In fact, it was not even "arguable" that federal law preempted Minnesota law since the federal law expressly stated that it is preemptive only "with respect to election to Federal office" (2 U.S.C. 453) whereas Minnesota law is concerned only with state elections and legislative activities. In any case, whether the question was "arguable" is now moot since Respondent does not contend that federal law preempted state law and, as a result, that the District Court had subject-matter jurisdiction.

Plainly, this language allows of no exception and establishes beyond doubt the principle that either a federal court has subject-matter jurisdiction or it does not; there is not even the slightest suggestion that a district court's erroneous assumption of subject-matter jurisdiction should not be disturbed if an appellate court is satisfied that there was a "reasonable" analytic process which the district court could have utilized in concluding it had subject-matter jurisdiction. Indeed, the rule established by the Second Circuit and adopted by the Eighth Circuit actually allows what this Court has forbidden—the assumption of jurisdiction by a federal court where none has been granted by statute. It is thus evident that the Eighth and Second Circuits have crafted a rule that has no basis in this Court's jurisprudence.

C) Consistent with this Court's long-established subject-matter jurisdiction jurisprudence, the Ninth Circuit, in *Gould v. Mutual Life Insurance Company of New York*, 790 F.2d 769 (9th Cir. 1986), *cert. den.*, 107 S.Ct. 580 (1986), reiterated the principles established in the Ninth Circuit regarding subject-matter jurisdiction.

First, the Ninth Circuit wrote that "[r]emoval is a question of federal subject-matter jurisdiction, *reviewable de novo.*" (emphasis added) 790 F.2d at 771. By contrast, the Second Circuit in *Nemaizer*—and thus the Eighth Circuit in the instant case—held only that an appellate court need "determine whether a reasonable basis existed for the lower court's implicit finding that it had jurisdiction." 793 F.2d at 65. Thus, the Eighth and Second Circuits are in conflict with the Ninth Circuit since the former have rejected *de novo* review of the question of subject-matter jurisdiction and substituted therefore review only of whether there was "an arguable basis" upon which subject matter jurisdiction could have rested.

Secondly, as a result of its careful adherence to this Court's teachings, the Ninth Circuit ruled that "a dis-

trict court is '*compelled* to exercise its authority under Rule 60(b)(4) to vacate' judgments in which it had erroneously asserted its own jurisdiction." (emphasis added) 790 F.2d at 774. Clearly, therefore, unlike the Eighth and Second Circuits, the Ninth Circuit has not allowed district courts to determine only if there was "an arguable basis" upon which a finding of subject-matter jurisdiction could have rested; rather, the Ninth Circuit simply mandates that, where jurisdiction is erroneous, the judgment must be vacated.

Predating the Ninth Circuit's decision in *Gould*, but very much consistent with it and with this Court's decision in *Insurance Corporation of Ireland*, the Sixth Circuit, in *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. den.*, 95 S. Ct. 1996 (1975), wrote that

> a court considering a motion to vacate [pursuant to Rule 60(b)(4) on the ground that the district court lacked subject-matter jurisdiction] has no discretion in determining whether it should be set aside. 500 F.2d at 704.

While *Jordon* involved a specific constitutional limitation (the Eleventh Amendment) on the jurisdiction of the federal courts, the principle enunciated in *Jordon*—that either a federal court has subject matter jurisdiction or it does not—applies equally to cases where the federal court exceeds "a statutory grant of jurisdiction," *Insurance Corporation of Ireland*, 456 U.S. at 701, 102 S. Ct. at 2103, since federal courts are "courts of limited jurisdiction" and such jurisdiction "is limited to those subjects encompassed within a statutory grant of jurisdiction." Ibid. Thus, unlike the Eighth and Second Circuits, the Sixth Circuit plainly has not adopted an "arguable basis" standard for determining the validity, in regard to subject matter jurisdiction, of district court judgments.[4]

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[4] Notably, the Sixth Circuit rejected the contention that, because "appellants failed to object to the award [judgment] until after

Recognizing the cogency of the Sixth Circuit's position, the First Circuit, in *Honneus v. Donovan*, 691 F.2d 1 (1st Cir. 1982), observed, regarding a motion made pursuant to Rule 60(b)(4), that "the district court had no discretion [to grant the motion] because a judgment is either void or it is not." 691 F.2d at 2. The significance of this statement to the instant case lies in the fact that the First Circuit had earlier equated the "absence of subject matter jurisdiction" to a "total want of jurisdiction" in distinguishing the absence of subject matter jurisdiction "from an error in the exercise of jurisdiction." *Lubben v. Selective Service System Local Board No. 27*, 453 F.2d 645, 649 (1st Cir. 1972). Clearly, therefore, the First Circuit recognized that the absence of subject-matter jurisdiction compelled the granting of a Rule 60(b)(4) motion to vacate.[5]

The Seventh Circuit has taken a position similar to the First Circuit, holding that a void judgment exists "where a court usurps power by rendering a judgment over maters beyond the scope of authority granted to it by its creators." *Ben Sager Chemicals International v. E. Targosz & Co.*, 560 F.2d 805, 812 (7th Cir. 1977). As this Court has made abundantly clear that a federal court's subject matter jurisdiction is "limited to those subjects encompassed within a statutory grant of jurisdiction," *Insurance Corporation of Ireland v. Compagnie Des Bauxites*, 456 U.S. at 701, 102 S.Ct. at 2103, it is plain that the Seventh Circuit views as void a district court judgment entered by a district court without

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the judgment was entered," the issue of subject matter jurisdiction could not be raised. 500 F.2d at 710.

[5] The First Circuit did not vacate the judgment in *Honneus* since the district court's error was only an assumption of *diversity*, not subject-matter, jurisdiction. Unlike subject-matter jurisdiction, which is "limited to those subjects encompassed within a statutory grant of jurisdiction," *Insurance Corporation of Ireland*, 456 U.S. at 701, 102 S. Ct. at 2103, absence of diversity jurisdiction "does not render the judgment null but only erroneous." 691 F.2d at 2.

subject-matter jurisdiction. Thus, the Seventh Circuit also has not adopted—and would find repugnant—the principle adopted by the Eighth and Second Circuits.

Finally, in *Potomac Passengers Association v. Chesapeake and Ohio Railway Co.*, 520 F.2d 91 (D.C. Cir. 1975), the District of Columbia Circuit wrote:

> That both parties to this suit, and the trial judge, proceeded on the assumption that the case was properly before the District Court does not alter our responsibility. Federal subject-matter jurisdiction cannot be created by consent, waiver, or even estoppel. 520 F.2d at 95, n.22.

As a result, while "regretful of the expenditures of time and energy which have gone into the present litigation," 520 F.2d at 95, the court unanimously reversed the district court's judgment on the second appeal as "the District Court's subject-matter jurisdiction was incorrect as a matter of law." 520 F.2d at 95. Moreover, in a statement of peculiar relevance to this case, the court held that

> If a federal court is powerless to adjudicate a controversy, it is duty-bound to recognize that fact, however belated its realization. . . . When an appellate court makes so fundamental an error as that of sustaining federal subject-matter jurisdiction where none exists, we think the court must exercise its discretion to correct that mistake. 520 F.2d at 95, n.22.

Thus, as with the Ninth, Sixth, First, and Seventh Circuits, the District of Columbia Circuit has concluded that finding the absence of subject-matter jurisdiction ends any inquiry regarding the validity of a district court judgment and mandates that the judgment be vacated. It is, as a result, clear that the Eighth and Second Circuits are in conflict with the decisions of this Court and the decisions of five other circuits.

CONCLUSION

For the reasons set forth above, this Court should issue a Writ of Certiorari to the Eighth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5173MN

MINNESOTA STATE ETHICAL PRACTICES BOARD,
Appellee,

vs.

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, *et al.*,
Appellants.

Appeal from the United States District Court
for the District of Minnesota

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Appellants' petition for rehearing by the panel is also denied.

The MEPB motion to tax costs against the NRA pursuant to Fed. R. App. P. 39 is denied as untimely filed; the motion to assess costs against the NRA for filing an alleged frivolous petition for rehearing en banc under 8th Cr. R.16(e) is denied.

May 20, 1988

Order entered at the Direction of the Court:

/s/ [Illegible]
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5173

MINNESOTA STATE ETHICAL PRACTICES BOARD,
Appellee,

v.

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND and MICHAEL MCCABE,
Appellants.

Appeal from the United States District Court
for the District of Minnesota

Submitted: December 14, 1987

Filed: February 8, 1988

Before LAY, Chief Judge; HEANEY and MAGILL, Circuit Judges.

PER CURIAM.

Finding no error of fact or law in the district court's opinion, we affirm pursuant to 8th Cir. R. 14.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-82-1458

MINNESOTA STATE ETHICAL PRACTICES BOARD,
Plaintiff,

vs.

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND and MICHAEL MCCABE,
Defendants.

Robert A. Alsop, Esq., and Jeffrey R. Brauchle, Esq., Holmes & Graven, 470 Pillsbury Center, Minneapolis, MN 55402, appeared for plaintiff.

Margaret Mead Amundson, Esq., 533 West Parkdale Plaza, 1660 South Highway 100, Minneapolis, MN 55416; and Richard E. Gardiner, Esq., 1600 Rhode Island Ave. N.W., Washington, D.C. 20036, appeared for defendants.

MEMORANDUM OPINION AND ORDER

On October 8, 1982, plaintiff Minnesota State Ethical Practices Board brought this action in Ramsey County District Court against the National Rifle Association of America (NRA) and a number of the NRA's officers seeking a declaratory judgment and permanent injunctive relief under the Minnesota Ethics in Government Act, Minn. Stat. § 10A.01 et seq. After removal, the court [1] entered judgment for plaintiff, and the Eighth

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[1] The Honorable Miles W. Lord, retired United States District Judge, presided over all trial court proceedings in this case. The

Circuit Court of Appeals affirmed. Now before the court is defendants' motion pursuant to Fed. R. Civ. P. 60(b) to dissolve the injunctions, vacate the judgment, and remand the case to state court on the ground that no subject matter jurisdiction exists.

Background

This case has a lengthy and complicated history which will only be summarized here. Plaintiff filed this action over four years ago in Minnesota state court, alleging that defendants violated the Minnesota Ethics in Government Act by failing to register as lobbyists and as a political fund in conducting their political activities. Plaintiff's complaint asserted only state law causes of action, although it anticipated that defendants might raise a First Amendment defense. On November 8, 1982, defendants filed a removal petition, arguing that federal question jurisdiction existed because the state statute was preempted by the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455, and because the suit threatened to deprive defendants of their First Amendment rights. Plaintiff subsequently moved for remand to state court, contending that no subject matter jurisdiction existed. Although the court never explicitly ruled on the motion to remand, it stated in its February 22, 1983 opinion denying defendants' motion to dismiss that "jurisdiction in the instant case is proper under the applicable law. . . ."

On May 2, 1984, the court entered judgment for plaintiff and issued an injunction requiring defendants to comply with the state statute. The Court of Appeals affirmed, rejecting defendants' constitutional challenge to the statute. 761 F.2d 509 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 853 (1986). On January 31, 1986, defendants

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instant motion was filed after his retirement and was assigned to this court for resolution.

filed a motion to recall mandate and vacate judgment in the Court of Appeals on the ground that subject matter jurisdiction was lacking. The Court of Appeals denied the motion without opinion on February 11, 1986. Defendants subsequently made their motion in this court.

Discussion

Defendants argue that federal jurisdiction never existed in this case because it could not be removed on the basis of an anticipated federal defense to a state law cause of action. Defendants note that plaintiff itself earlier moved for remand on the basis that no federal jurisdiction existed and has never asserted that federal jurisdiction exists. Defendants admit that they were responsible for the removal of the case, but argue that parties cannot consent to confer federal jurisdiction where it does not exist. Moreover, defendants assert that the validity of the court's order is dependent upon the existence of subject matter jurisdiction; without it, they argue, the order should be vacated.

Plaintiff responds that the federal courts have dealt with this case nine times and argues that there must be some finality to judgments. According to plaintiff, *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), establishes that a final judgment on the merits is *res judicata* on the issue of subject matter jurisdiction, even though that issue was not litigated. Plaintiff also finds support in the Second Restatement of Judgments which provides that issuance of a judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation subject to certain exceptions, which, according to plaintiff, are not met here.

Defendants reply that *Chicot County* is inapplicable because the Supreme Court was concerned there with raising the issue in a subsequent suit. Defendants claim that the instant case is distinguishable because the issue

has been raised at a later stage of the same suit rather than in a subsequent action. In addition, defendants assert that the case falls within all three exceptions to the rule set forth in the Second Restatement of Judgments.

Plaintiff also argues that the "law of the case" doctrine, as applied to the Court of Appeals' decision denying defendants' motion to recall mandate and vacate judgment, precludes this court from ruling on defendants' motion. Here, plaintiff argues that the one-sentence order issued by the Court of Appeals "was clearly in response to the NRA's specific argnment claiming that the district court lacked subject matter jurisdiction." Plaintiff further asserts that none of the three exceptions to the doctrine applies.

Defendants argue that the "law of the case" doctrine does not preclude the court from considering their motion because it is not clear that the Court of Appeals decided the issue and because the Court of Appeals issued an unexplained order rather than an "opinion." According to defendants, the Court of Appeals may have relied on plaintiff's argument that recalling a mandate is unusual relief that should be granted sparingly rather than reaching the merits of the motion.

In *Kansas City Southern Railway Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 955 (1980), the Court of Appeals set the standard to be applied to a motion to vacate judgment for lack of subject matter jurisdiction under Fed. R. Civ. P. 60(b):

> Absence of subject matter jurisdiction *may*, in certain cases, render a judgment void. However, this occurs only where there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority. Stated another way, such plain usurpation of power occurs

> when there is a "total want of jurisdiction" as distinguished from "an error in the exercise of jurisdiction." . . . [E]rror in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction. Such an erroneous interpretation does not render the judgment a complete nullity. A void judgment, as opposed to an erroneous one, is one which from its inception was legally ineffective.

Id. at 825 (citations omitted). "[A] court will be deemed to have plainly usurped jurisdiction only when there is . . . no arguable basis on which it could have rested a finding that it had jurisdiction." *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986). Accordingly, the court must determine whether or not there was an arguable basis on which the finding of jurisdiction in this case could have rested.

The Supreme Court has established that "if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983) (citing *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)). In their petition for removal, defendants argued that the Minnesota Ethics in Government Act was preempted by the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455. Defendants' preemption assertion, although perhaps erroneous, presents an arguable basis for a finding of jurisdiction. *See Nemaizer*, 793 F.2d at 65 (district court's implicit finding that it had jurisdiction on basis of federal preemption "was reasonable, and therefore immune from collateral challenge under Rule 60(b)(4)"). As a result, the court's judgment is not void and defendants' motion should be denied.[2]

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[2] Under the circumstances, the court need not determine whether the law of the case doctrine precludes consideration of the motion.

Accordingly, based on the above and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that defendants' motion to dissolve the injunction, vacate the judgment and remand the case is denied.

Dated: February 19, 1987

/s/ Diana E. Murphy
DIANA E. MURPHY
United States District Judge

Although the basis of the Court of Appeals denial of defendants' motion is not explicitly stated, defendants did raise the same issue of subject matter jurisdiction before that court. Obviously, this court would not knowingly rule counter to the appellate court.

Several courts have ruled that the law of the case doctrine does not apply to the issue of subject matter jurisdiction. *See, e.g., Amen v. Dearborn*, 718 F.2d 789, 793-94 (6th Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984); *Green v. Department of Commerce*, 618 F.2d 836, 839 n.9 (D.C. Cir. 1980).